Dr HK Fong BrainBuilder Pte Ltd v SG-Maths Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22IP-40–08 OF 2016
WONG KIAN KHEONG J
11 JUNE 2018

Contract — Agreement — Franchise — Parties entered into master license agreement to operate and manage business to teach mathematics — Whether there was breach of agreement — Whether court had jurisdiction to hear matter — Whether Malaysian laws applied to facts of case — Whether documents executed valid — Whether there was unjust enrichment — Whether claim and counterclaim ought to be allowed — Contracts Act 1950 — Franchise Act 1998

The present case concerned 'Dr Fong's Method' of teaching mathematics to students in primary and secondary schools which has been developed by one Dr Fong, a Singaporean. Dr Fong incorporated the plaintiff in Singapore. The plaintiff entered into a master license agreement ('MLA 2013') with the first defendant, allowing the first defendant to, inter alia, operate and manage a business to teach mathematics to students, 'BrainBuilder business' ('BB business') in Malaysia. In the first defendant, the second and third defendants owned a total of 85% of the paid-up shares while Dr Fong held 15%. The second and third defendants were also the only directors of the first defendant. Dr Fong discovered that the first defendant had breached the MLA 2013 when the later awarded a sublicense to one Encik Suhaimi to operate BB centres. According to the plaintiff: (a) the fourth defendant took over a registered business, 'Pusat Latihan Perkembangan Kaji Kreatif' ('PLPKK'), from the second and third defendants; (b) PLPKK ran 'TeamMathics' business which unlawfully: (i) competes with BB business; and (ii) uses the plaintiff's confidential information. The plaintiff claimed against the defendants at the High Court and submitted that: (1) the second and third defendants were liable to the plaintiff under the guarantee for the first defendant's breaches of the MLA 2013; (2) the second and third defendants have set up the fifth and sixth defendants as limited liability partnerships to conduct business which unlawfully competes the BB business; and (3) the fifth and sixth defendant had wrongfully utilised the plaintiff's confidential information. The first to third defendants counterclaimed against the plaintiff for: (A) a declaration that the MLA and guarantee valid; (B) the plaintiff shall refund all money paid by the first defendant to the plaintiff and Dr Fong; and (C) the plaintiff shall pay compensatory, exemplary and aggravated damaged to the first to third defendants. The issues that arose were: (I) whether Malaysia courts have the jurisdiction to hear the case; (II) whether Malaysian/Singaporean laws applied to the MLA 2013; (III) whether the documents executed by the parties were

void; (IV) whether the court may grant remedy to any party under ss 6 or 7 of the Contracts Act 1950 ('the CA') or the doctrine of unjust enrichment; (V) whether Dr Fong misrepresented to the first to third defendants in respect of the three documents; and (VI) whether the plaintiff's suit was an abuse of the court process.

Held, dismissing the plaintiff's claim and the defendant's counterclaim:

(1) The parties have irrevocably submitted to the jurisdiction of the Malaysian court and were estopped from disputing the court's jurisdiction to the case. The plaintiff's suit was filed in Malaysia and none of the defendants applied to declare that Malaysian court has no jurisdiction to try the plaintiff's suit. Similarly, the counterclaim had been filed but the plaintiff did not apply for a declaration that the court had no jurisdiction to decide the counterclaim. The parties had also participated in the trial which had been completed (see para 22).

(2) Clause 56 of the MLA 2013 states that the MLA 2013 'shall be governed and construed according to the laws of Malaysia' while cl 37 states Singaporean law is applicable to the MLA 2013. Despite, cl 37, Malaysian laws apply to the MLA 2013. The plaintiff and the first to third defendants could not circumvent the mandatory application of ss 6(1) and 6A(1) of the Franchise Act 1998 ('the FA'). The MLA 2013 had also contravened ss 6(1) and 6A(1) of the FA. Accordingly, the MLA 2013, including cl 37, was void and unenforceable (see para 24).

(3) Dr Fong and the plaintiff were legally-advised by the plaintiff's solicitor to register the first defendant's BB business franchise under the FA. However, Dr Fong and the plaintiff chose to ignore this. Even if there was the first defendant's failure not to register the BB business franchise under s 6A(1) of the FA, the plaintiff could have exercised the power granted by the first defendant to the plaintiff under the power of attorney and apply to the Registrar to register the same under s 6A(1) of the FA (see para 40).

(4) The three documents constituted a single composite transaction. Therefore, the illegality of the MLA 2013 will consequently taint the guarantee and the power of attorney. Accordingly, the guarantee and the power of attorney will be similarly void in their entirety under s 24(a) and/or (b) of the CA (see para 42).

(5) Section 66 could not be invoked because the first defendant made payments under the MLA to Dr Fong and the plaintiff regarding the first defendant's right to operate the BB business. As such, the first defendant did not receive any advantage under the MLA 2013 to be restored to the plaintiff under s 66 of the CA. Moreover, the plaintiff had taken the position that the MLA 2013 was valid and had not breached the FA. Hence, the plaintiff did not plead and adduce any evidence regarding any

advantage received by the first defendant under a void MLA 2013. Furthermore, there was no evidence to prove that: (a) the first to third defendants have been enriched in this case; (b) the enrichment of the first to third defendants has been gained at the expense of the plaintiff or Dr Fong; and (c) the retention of benefit by the first to third defendants is unjust (see para 48).

(6) The plaintiff's suit could not constitute an abuse of the court process because the first to third defendants have breached the MLA 2013 and save for the illegality of the guarantee, the second and third defendants would have been liable to the plaintiff under the guarantee (see para 71).

[Bahasa Malaysia summary

Kes ini melibatkan 'Dr Fong's Method' iaitu teknik mengajar matematik kepada pelajar di sekolah rendah dan menengah yang dimajukan oleh Dr Fong, seorang warganegara Singapura. Dr Fong menubuhkan plaintif di Singapura. Plaintif memasuki perjanjian lesen induk ('MLA 2013') dengan defendan pertama, membenarkan defendan pertama untuk, antara lain, mengendalikan dan menguruskan perniagaan untuk mengajar matematik kepada pelajar, 'Perniagaan Brainbuilder' ('perniagaan BB') di Malaysia. Dalam defendan pertama, defendan kedua dan ketiga memiliki 85% saham berbayar sementara Dr Fong memegang 15%. Defendan kedua dan ketiga juga merupakan pengarah defendan pertama. Dr Fong mendapati bahawa defendan pertama telah melanggar MLA 2013 apabila kemudiannya memberikan sub-lesen kepada seorang Encik Suhaimi untuk mengendalikan pusat BB. Menurut plaintif: (a) defendan keempat mengambil alih perniagaan berdaftar, 'Pusat Latihan Perkembangan Kaji Kreatif' ('PLPKK'), dari defendan kedua dan ketiga; (b) PLPKK menjalankan perniagaan 'TeamMathics' yang melanggar undang-undang kerana: (i) bersaing dengan perniagaan BB; dan (ii) menggunakan maklumat sulit plaintif. Plaintif menuntut terhadap defendan di Mahkamah Tinggi dan menghujahkan: (1) defendan kedua dan ketiga bertanggungjawab kepada plaintif bawah jaminan untuk pelanggaran MLA 2013 oleh defendan pertama; (2) defendan kedua dan ketiga telah menubuhkan defendan kelima dan keenam sebagai perkongsian liabiliti terhad untuk menjalankan perniagaan yang secara tidak sah bersaing dengan perniagaan BB; dan (3) defendan kelima dan keenam, dengan salah, menggunakan maklumat rahsia plaintif. Defendan pertama hingga ketiga menuntut balas terhadap plaintif untuk: (A) perisytiharan bahawa MLA dan jaminan adalah sah; (B) plaintif akan membayar semula semua wang yang dibayar oleh defendan pertama kepada plaintif dan Dr Fong; dan (C) plaintif hendaklah membayar ganti rugi pampasan, teladan dan teruk kepada defendan pertama dan ketiga. Isu-isu yang timbul adalah: (I) sama ada mahkamah-mahkamah Malaysia mempunyai bidang kuasa mendengar kes ini; (II) adakah undang-undang Malaysia/Singapura terpakai pada MLA 2013; (III) sama ada dokumen yang disempurnakan oleh pihak-pihak terbatal; (IV)

sama ada mahkamah boleh memberikan remedi kepada mana-mana pihak di bawah ss 6 atau 7 Akta Kontrak 1950 ('AK') atau doktrin pengkayaan tidak adil; (V) sama ada Dr Fong memberi salah nyataan kepada defendan pertama hingga ketiga berhubung tiga dokumen itu; dan (VI) sama ada saman plaintif adalah penyalahgunaan proses mahkamah.

Diputuskan, menolak tuntutan plaintif dan tuntutan balas defendan:

(1) Pihak-pihak telah berserah, tanpa boleh menarik diri, pada bidang kuasa mahkamah Malaysia dan diestop daripada mempertikaikan bidang kuasa mahkamah terhadap kes. Saman plaintif difailkan di Malaysia dan tiada seorang pun daripada defendan yang memohon untuk mengisytiharkan bahawa mahkamah Malaysia tidak mempunyai bidang kuasa membicarakan saman plaintif. Begitu juga, tuntutan balas telah difailkan tetapi plaintif tidak memohon pengisytiharan bahawa mahkamah tidak mempunyai bidang kuasa memutuskan tuntutan balas tersebut. Pihak-pihak juga turut mengambil bahagian dalam perbicaraan yang telah selesai (lihat perenggan 22).

(2) Klausa 56 MLA 2013 menyatakan bahawa MLA 2013 'akan ditadbir dan ditafsirkan mengikut undang-undang Malaysia' manakala klausa 37 menyatakan undang-undang Singapura terpakai pada MLA 2013. Walaupun wujud klausa 37, undang-undang Malaysia terpakai pada MLA 2013. Plaintif dan defendan pertama hingga ketiga juga tidak boleh memintas pemakaian mandatori ss 6(1) dan 6A(1) Akta Francais 1998 ('AF'). MLA 2013 juga telah melanggar ss 6(1) dan 6A(1) AF. Oleh itu, MLA 2013, termasuk klausa 37, tidak sah dan tidak boleh dikuatkuasakan (lihat perenggan 24).

(3) Dr Fong dan plaintif telah diberi nasihat undang-undang oleh peguamcara plaintif untuk mendaftarkan francais perniagaan BB defendan pertama di bawah AF. Walau bagaimanapun, Dr Fong dan plaintif memilih untuk mengabaikan ini. Walaupun terdapat kegagalan oleh defendan pertama untuk tidak mendaftarkan francais perniagaan BB di bawah s 6A(1) AF, plaintif boleh melaksanakan kuasa yang diberikan oleh defendan pertama kepada plaintif di bawah surat kuasa wakil dan memohon kepada Pendaftar untuk mendaftarnya di bawah s 6A(1) AF (lihat perenggan 40).

(4) Ketiga-tiga dokumen ini merupakan satu transaksi komposit tunggal. Oleh itu, penyalahgunaan MLA 2013 akan menjejaskan jaminan dan surat kuasa wakil. Berikutan itu, jaminan dan surat kuasa wakil sama sekali tidak sah bawah s 24(a) dan/atau (b) AK (lihat perenggan 42).

(5) Seksyen 66 tidak boleh digunakan kerana defendan pertama membuat bayaran bawah MLA kepada Dr Fong dan plaintif mengenai hak defendan pertama untuk mengendalikan perniagaan BB. Oleh itu,

defendan pertama tidak mendapat sebarang kelebihan bawah MLA 2013 untuk dipulangkan kepada plaintif di bawah s 66 AK. Selain itu, plaintif telah mengambil kedudukan bahawa MLA 2013 sah dan tidak melanggar AF. Oleh itu, plaintif tidak memplidkan dan mengemukakan apa-apa keterangan tentang kelebihan yang diterima oleh defendan pertama bawah MLA 2013 yang tidak sah. Selain itu, tidak ada bukti untuk membuktikan bahawa: (a) defendan pertama dan ketiga telah diperkaya dalam kes ini; (b) pengkayaan defendan pertama dan ketiga telah diperoleh dengan menjejaskan plaintif atau Dr Fong; dan (c) pengekalan faedah oleh defendan pertama dan ketiga adalah tidak adil (lihat perenggan 48).

(6) Guaman plaintif bukan penyalahgunaan proses mahkamah kerana defendan pertama dan ketiga telah melanggar MLA 2013 dan kecuali kesahihan jaminan, defendan kedua dan ketiga mungkin akan bertanggungjawab kepada plaintif di bawah jaminan (lihat perenggan 71).]

Notes

For cases on agreement in general, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3449–3586.

Cases referred to

Atlas Maritime Co SA v Avalon Maritime Ltd; The Coral Rose (No 1) [1991] 4 All ER 769, CA (refd)

Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors [2016] MLJU 1251; [2017] 2 MLRH 177, HC (folld)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (folld)

Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor [2016] 3 MLJ 417; [2016] 6 CLJ 176, FC (refd)

Fitzgerald v FJ Leonhardt Pty Ltd [1997] HCA 17; (1997) 143 ALR 569, HC (not folld)

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449; [2015] 9 CLJ 537, FC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773, FC (refd)

Hall v Hebert [1993] 2 SCR 159, SC (not folld)
Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281, SC (refd)
Lim Seng Kiat & Anor v Jee Hing Lim & Anor [2015] MLRHU 1, HC (refd)
Malayan Banking Bhd v Neway Development Sdn Bhd & Ors [2017] 5 MLJ 180, FC (refd)
Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425; [1998] 2 CLJ 340, CA (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 5 MLRA 377, FC (refd)
Munafsya Sdn Bhd v Proquaz Sdn Bhd [2012] MLRHU 1, HC (refd)
Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors [2016] 11 MLJ 38, HC (refd)
Nelson v Nelson [1995] HCA 25; (1995) 132 ALR 133, HC (not folld)
Norihan bt Talib (sued in her personal capacity and trading under the name 'Tanjung Trading') & Ors v Mohd Nasir bin Hassan & Ors (suing on their own behalf and for 420 others as per list at 'Appendix A') and another appeal [2018] 3 MLJ 670; [2017] MLRAU 1, CA (not folld)
Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)
Patel v Mirza [2017] 1 All ER 191, SC (not folld)
PP v Yap Min Woie [1996] 1 MLJ 169, FC (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)
SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)
SP Multitech Intelligent Homes Sdn Bhd v Home Sdn Bhd [2010] MLJU 1845; [2010] 16 MLRH 537, HC (refd)
Siow Wong Fatt v Susur Rotan Mining Ltd & Anor [1967] 2 MLJ 118, PC (folld)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301; [2014] 4 MLRA 11, FC (folld)
Tan Kang Hai v Slimming Sanctuary Sdn Bhd [2016] MLJU 973; [2016] 5 MRLH 651, HC (refd)
Tea Delights (M) Sdn Bhd v Yeap Win Nee [2015] MLJU 673; [2015] MLRHU 1, HC (refd)
Tenaga Nasional Bhd v Api-Api Aquaculture Sdn Bhd [2015] 3 AMR 811 (refd)
YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd [1997] 2 MLJ 621, CA (folld)

Legislation referred to

Contracts Act 1950 ss 18, 18(a), (b), (c), 24, 24(a), (b), 66, 71
Courts of Judicature Act 1964 s 23(1)(a), (1)(b), (1)(c)
Franchise Act 1998 ss 3(1), 4, 4(a), (b), (c), (e), 5(1), (2), 6, 6(1), (2), (2)(a), 6A 6A(1), 6B, 6B(1), 7, 58
Illegal Contracts Act 1970 [NZ] s 7(1)
Interpretation Acts 1948 and 1967 ss 2(1)(a), 17A, Part I
Pengurusan Danaharta Nasional Berhad Act 1998
Rules of Court 2012 O 12 r 10(1)(g)

Joy Wilson Appukuttan (Tan Sin Yee with him) (KH Lim & Co) for the plaintiff.
Kok Pok Chin (Ong Hong Keit with him) (PC Kok & Co) for the defendants.

Wong Kian Kheong J:

A. INTRODUCTION

[1] This case concerns 'Dr Fong's method' of teaching mathematics to students in primary and secondary schools ('Dr Fong's method') which has been developed by Dr Fong Ho Kheong ('Dr Fong'), a Singaporean citizen.

[2] Dr Fong incorporated the plaintiff company ('the plaintiff') in Singapore. The plaintiff has entered into a master license agreement dated 18 December 2013 ('the MLA (2013)') with the first defendant company ('the first defendant'). The MLA (2013) allows the first defendant to, among others, operate and manage the 'BrainBuilder' business (a business to teach mathematics to students) ('BrainBuilder business') in Malaysia.

[3] The following issues arise in this case:

(a) in view of cl 37 of the MLA (2013) (cl 37):

(i) does the Malaysian court have jurisdiction to hear this case? In this regard, have the plaintiff and all the defendants ('the defendants') in this matter submitted to the jurisdiction of Malaysian court? and

(ii) if this court has jurisdiction to hear this case, whether the law of Malaysia or Singapore applies to the MLA (2013);

(b) if Malaysian law applies to the MLA (2013):

(i) whether the Franchise Act 1998 ('the FA') applies to the MLA (2013);

(ii) if the FA applies to the MLA (2013), have ss 6(1) and/or 6A(1) of the FA been breached in this case? and

(iii) if there is a breach of ss 6(1) and/or 6A(1) of the FA, whether the following documents are void under s 24(a) and/or (b) of the Contracts Act 1950 ('the CA'):

(1) is the MLA (2013) void in its entirety or can the court sever the illegal part of the MLA (2013) and enforce its remaining part?

(2) a guarantee dated 18 December 2013 executed by the second defendant ('the second defendant') and third defendant ('the third defendant') in favour of the plaintiff ('guarantee'); and

(3) a power of attorney dated 18 December 2013 given by the first defendant to the plaintiff ('PA');

(c) if the MLA (2013), guarantee and PA ('three documents') are void, whether the court may grant remedy to any party under:

(i) s 66 of the CA;

(ii) s 71 of the CA; or

(iii) the doctrine of unjust enrichment;

(d) if the three documents are valid:

(i) whether the first to third defendants have breached the MLA (2013); and

(ii) are the second and third defendants liable to the plaintiff under the guarantee?

(e) whether the second to sixth defendants have committed the following torts:

(i) the tort of conspiracy to defraud the plaintiff; and

(ii) the tort of breach of confidence;

(f) whether Dr Fong had misrepresented to the first to third defendants in respect of the three documents; and

(g) whether the plaintiff's suit in this case ('the plaintiff's suit') constitutes an abuse of court process.

B. THE PLAINTIFF'S CASE

[4] Dr Fong has a doctorate in mathematics education, a subject which focuses on mathematical theories, practice and development of curriculum materials. Dr Fong was a former Associate Professor in the National Institute of Education, Nanyang Technological University, Singapore. Dr Fong has given

A lectures to teachers of primary and secondary schools in Singapore, Malaysia, South Korea, Bahrain and United Arab Emirates.

[5] Dr Fong claims to have developed Dr Fong's Method to help students to learn Mathematics. Dr Fong then developed the BrainBuilder Business which B uses Dr Fong's Method to teach mathematics to students.

[6] The second and third defendants have been Dr Fong's 'best friends' for approximately 55 years. The second and third defendants were interested to start the BrainBuilder Business in Malaysia. Consequently, the first defendant C was incorporated in Malaysia on 27 June 2005 with:

(a) the second and third defendants owning a total of 85% of the paid up shares in the first defendant;

D (b) Dr Fong holds 15% of the paid up shares in the first defendant; and

(c) the second and third defendants are the only directors of the first defendant.

E **[7]** Dr Fong Brainbuilder Pte Ltd ('DFB') is a company incorporated in Singapore by Dr Fong. DFB entered into a master license agreement with the first defendant on 26 February 2008 ('the MLA (2008)'). By reason of the MLA (2008):

(a) Dr Fong provided Dr Fong's method and confidential information to the F first defendant; and

(b) the first defendant operated the BrainBuilder business in Malaysia by opening centres to teach mathematics to students by using Dr Fong's Method ('BB Centres').

G **[8]** The the MLA (2008) expired on 30 June 2012. On 18 December 2013, the three documents were executed.

[9] Dr Fong first discovered that the first defendant had breached the MLA H (2013) when the latter awarded a sublicense to Encik Suhaimi bin Ramly ('Encik Suhaimi') to operate a BB Centre at Setapak ('Setapak Centre').

[10] After Dr Fong's discovery of Setapak Centre, he appointed Mr Andrew Tham Chee Hoong ('SP1') and Mr Michael Tham Chek Mun ('SP2') to assist I the plaintiff. The plaintiff alleged that the first defendant had committed various breaches of the MLA (2013).

[11] The fourth defendant ('the fourth defendant') is the second defendant's daughter and a former employee of the first defendant. The plaintiff alleged

that the fourth defendant took over a registered business, 'Pusat Latihan Perkembangan Kaji Kreatif' ('PLPKK'), from the second and third defendants. According to the plaintiff, PLPKK runs 'TeamMathics' business which unlawfully:

(a) competes with BrainBuilder Business; and

(b) uses the plaintiff's confidential information ('the plaintiff's confidential information').

[12] The plaintiff claims, among others, as follows:

(a) the second and third defendants are liable to the plaintiff under the guarantee for the first defendant's breaches of the MLA (2013);

(b) the second and third defendants have set up the fifth defendant ('the fifth defendant') and sixth defendant (the sixth defendant') as limited liability partnerships to conduct business which unlawfully competes with BrainBuilder business; and

(c) the fifth and sixth defendants have wrongfully utilised the plaintiff's confidential information.

[13] Due to the first defendant's various breaches of the MLA (2013), the plaintiff terminated the MLA (2013) ('termination') by way of a letter dated 8 October 2015 from the plaintiff to the second and third defendants ('termination notice'). The first defendant did not comply with post-termination provisions in the MLA (2013) so as to enable the plaintiff to take over the first defendant's BB Centres.

C. THE DEFENDANTS' CASE

[14] The second and third defendants testified, among others, as follows:

(a) Dr Fong's Method is based on Singapore's Mathematics syllabus ('Singapore Maths') which is created by Dr Kho Tek Hong, the Principal Curriculum Specialist in the Curriculum Planning and Development Division of Singapore's Ministry of Education. Singapore Maths is owned by the Singapore Government and not by Dr Fong or the plaintiff;

(b) Singapore Maths is taught in Malaysia by many tuition and learning centres;

(c) the second and third defendants had been misled by Dr Fong as follows:

(i) the second and third defendants signed the MLA (2008) and the MLA (2013) based on Dr Fong's misrepresentation that both

agreements were franchise agreements and the MLA (2013) was an extension of the MLA (2008);

(ii) the second and third defendants were misled to believe that DFB was the same company as the plaintiff. If the the second and third defendants had known that DFB was not the same company as the plaintiff, the first defendant would not have executed the MLA (2013); and

(iii) the second and third defendants were misled to believe that the plaintiff has rights to the registered trade marks or patent regarding Singapore Maths (taught by the first defendant); and

(d) the second and third defendants proposed to sell the first defendant's BrainBuilder business to the plaintiff for RM2.5m. Dr Fong initially agreed to this proposal but later Dr Fong reneged on his word. SP2 is SP1's father. The first to third defendants claimed that the termination notice was sent to enable SP1 and SP2 to take over the first defendant's BrainBuilder business ('alleged acquisition') without having to pay RM2.5m for the alleged acquisition.

[15] The first to third defendants counterclaimed against the plaintiff ('counterclaim (first to third defendants)') for, among others, the following relief:

(a) a declaration that the MLA (2013) and guarantee are invalid;

(b) the plaintiff shall refund all money paid by the first defendant to the plaintiff and Dr Fong; and

(c) the plaintiff shall pay compensatory damages (to be assessed by the court), exemplary damages and aggravated damages to the first to third defendants.

[16] The fourth defendant is the sole proprietor of PLPKK and is a partner of the fifth and sixth defendants. According to the fourth defendant:

(a) the fourth defendant was an employee of the first defendant who resigned after the termination;

(b) PLPKK has no business and bank account. PLPKK's name was used to apply for a tuition centre license from the Ministry of Education and a business license from Subang Jaya's Municipal Council. The fourth defendant allowed PLPKK's name to be used for a TeamMathics 'motivation centre' ('TeamMathics Centre');

(c) the fifth and sixth defendants do not operate mathematics tuition centres. The fifth and sixth defendants are only involved in organising mathematics competitions for school students;

(d) there is no contract between the plaintiff on the one part and the fourth to sixth defendants on the other part. There is also no dealing between the plaintiff on the one hand and the fourth to sixth defendants on the other hand. Prior to the filing of the plaintiff's suit, the fourth to sixth defendants did not receive any demand from the plaintiff or its solicitors; and

(e) the plaintiff's suit was filed against the fourth to sixth defendants to put pressure on the second defendant to give in to the plaintiff's suit.

D. PRELIMINARY MATTERS

D(1). Does the Malaysian court have jurisdiction to try this case?

[17] Clause 37 provides as follows:

> The construction, interpretation and enforcement of (MLA (2013)) is governed by the laws in force in Singapore and the parties unconditionally and irrevocably submit to the non-exclusive jurisdiction of the Courts in Singapore.

[18] In the Court of Appeal case of *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621 at p 666, Mahadev Shankar JCA has held that there is a distinction between the question of whether the court has jurisdiction to hear a case and and the issue of which law should apply in the case. Based on *YK Fung Securities*, I shall first decide whether Malaysian court has jurisdiction to hear this case in light of cl 37.

[19] Firstly, I am of the view that Malaysian High Court has jurisdiction to hear this case under s 23(1)(a), (b) and/or (c) of the Courts of Judicature Act 1964 ('the CJA') as follows:

(a) the plaintiff's suit is based on, among others, the alleged breaches of the MLA (2013) and guarantee in Malaysia. The causes of action for breaches of the MLA (2013) and guarantee arise in Malaysia (not in Singapore) and hence, the Malaysian High Court has jurisdiction to try this case pursuant to s 23(1)(a) of the CJA;

(b) s 23(1)(b) of the CJA cloaks this court with jurisdiction to try this matter because:

  (i) the second to fourth defendants reside in Malaysia; *and/or*

  (ii) the first defendant has its place of business in Malaysia; *and/or*

(c) as provided in s 23(1)(c) of the CJA, the facts on which the plaintiff's suit and the counterclaim (first to third defendants) are based, exist or are alleged to have occurred solely in Malaysia (not Singapore).

[20] Secondly, the Malaysian court (not a court in Singapore) is the 'forum conveniens' (appropriate forum) to decide this case for the following reasons:

(a) the three documents had been prepared in Malaysia by the plaintiff's solicitors, Messrs Anne Hooi & Assoc (who practised law in Malaysia);

(b) the three documents had been executed in Malaysia;

(c) the MLA (2013) was performed in Malaysia, in particular, payments pursuant to the MLA (2013) were made by the first defendant to the plaintiff and Dr Fong in Malaysia;

(d) the alleged breaches of the MLA (2013) and duarantee took place solely in Malaysia; and

(e) all the witnesses, except for Dr Fong, reside in Malaysia.

[21] Clause 37 has only provided for Singapore courts to have non-exclusive jurisdiction to decide regarding the MLA (2013). In other words, cl 37 does not bar a Malaysian court from hearing this case. Even if there is a clause in the MLA (2013) which confers exclusive jurisdiction on a Singapore court to try this case, such a contractual clause cannot be enforced in view of the breach of ss 6(1) and 6A(1) of the FA which render the MLA (2013) void under s 24(a) and/or (b) of the CA (please see Part F(3) below).

[22] In any event, the plaintiff and defendants have irrevocably submitted to the jurisdiction of Malaysian court and are estopped from disputing this court's jurisdiction to try this case. This decision is based on the following reasons:

(a) the plaintiff's suit is filed in Malaysia and none of the defendants have applied under O 12 r 10(1)(g) of the Rules of Court 2012 ('the RC') for a declaration that Malaysian court has no jurisdiction to try the plaintiff's suit;

(b) the counterclaim (first to third defendants) had been filed but the plaintiff did not apply under O 12 r 10(1)(g) of the RC for a declaration that this court had no jurisdiction to decide the counterclaim (first to third defendants);

(c) the defendants applied to court and obtained an order for the plaintiff to provide security for costs of the plaintiff's suit ('SFC order'). The plaintiff had complied with the SFC order; and

(d) all the parties in this case had participated in the trial which had been completed.

D(2). Is Malaysian law applicable to the MLA (2013)?

[23] Clause 56 of the MLA (2013) ('cl 56') states that the MLA (2013) 'shall be governed and construed according to the laws of Malaysia'. There is a conflict between cl 37 (Singaporean law is applicable to the MLA (2013)) and cl 56.

[24] Despite cl 37, I have no hesitation to apply Malaysian law to the MLA (2013). For reasons explained in Parts F(2) and F(3) below:

(a) the plaintiff and the first to third defendants cannot circumvent the mandatory application of ss 6(1) and 6A(1) of the FA; and

(b) the MLA (2013) has contravened ss 6(1) and 6A(1) of the FA. Accordingly, the MLA (2013), including cl 37, is void and unenforceable.

D(3). Who is alter ego of DFB, the plaintiff and the first defendant?

[25] The Federal Court cases of *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785 at p 803; [2014] 3 CLJ 73 at p 92, *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773 at paras 96–99 and *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537 at paras 39 and 44–45, have laid down the following two conditions to be fulfilled ('two conditions') for the court to pierce or lift a corporate veil to reveal an individual as the company's alter ego, controller or 'directing mind and will':

(a) there exists special circumstances to pierce or lift the corporate veil ('first condition'), such as the existence of an illegal contract; *and*

(b) the piercing or lifting of a corporate veil is in the interest of justice ('second condition').

[26] There is a difference between the piercing of a corporate veil and its lifting. A company's corporate veil is pierced by a party when the party seeks to impose personal liability on an individual. The court lifts (not pierces) the corporate veil of a company to ascertain the true factual position without imposing any personal liability on a particular individual — please see Staughton LJ's judgment in the English Court of Appeal case of *Atlas Maritime Co SA v Avalon Maritime Ltd; The Coral Rose (No 1)* [1991] 4 All ER 769 at p 779.

[27] I am satisfied that the two conditions have been fulfilled for the court to lift the corporate veil of DFB and the plaintiff to reveal Dr Fong as the alter ego of these two companies. This decision is premised on the following evidence and reasons:

(a) the first condition has been satisfied because the first to third defendants have claimed that the MLA (2013) is illegal for breaching s 6A(1) of the FA — please refer to the Supreme Court's judgment delivered by Peh Swee Chin SCJ in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281 at p 291; and

(b) the second condition is met because the following evidence and reasons show that it is in the interest of justice to lift the corporate veil of DFB and the plaintiff:

(i) in Dr Fong's first witness statement (WSSP4A, answer to question No 14), he admitted that DFB is his company;

(ii) para 9 of the statement of claim ('SOC') pleaded that Dr Fong is the founder of the plaintiff;

(iii) the BrainBuilder Business of DFB and the plaintiff is based on Dr Fong's method;

(iv) the first defendant made payments due under the MLA (2013) to Dr Fong personally (instead of the plaintiff); and

(v) SP1 testified during cross-examination that Dr Fong instructed the plaintiff to file the plaintiff's suit.

[28] This court pierces the first defendant's corporate veil to show that the second and third defendants are its alter ego because:

(a) the second and third defendants have alleged illegality in this case. Hence, the fulfilment of the first condition in this case; and

(b) the second condition is satisfied because the following evidence and reasons show that it is in the interest of justice to pierce the first defendant's corporate veil:

(i) if the second and third defendants are not the first defendant's alter ego, they would not have executed the guarantee to indemnify the plaintiff and its 'officers, directors, shareholders and employees against any and all losses, damages, liabilities, costs and expenses ... resulting from ... any failure' by the first defendant to perform the MLA (2013) — please see cl 2 of the guarantee;

(ii) the second and third defendants own 85% of the total shares in the first defendant;

(iii) the second and third defendants are the only directors of the first defendant;

(iv) emails, letters and minutes of meetings have been sent by Dr Fong, SP1, SP2 and the plaintiff to the second and third defendants (not to the first defendant) regarding the first defendant's BB Centres; and

(v) despite the fact that the termination notice was sent to the second and third defendants (not to the first defendant), the second and third defendants did not insist for the plaintiff to send the termination notice to the first defendant.

E. CREDIBILITY OF WITNESSES

[29] I find as a fact that Dr Fong, SP1 and SP2 are credible witnesses. This is because firstly, their testimonies are supported by contemporaneous emails, letters and minutes of meetings. Secondly, the lengthy cross-examination of Dr Fong, SP1 and SP2 by the defendants' learned counsel, did not show any reason to doubt their veracity.

[30] It is this court's finding of fact that the second defendant is an unreliable witness. This decision is premised on the following evidence and reasons:

(a) the second defendant's testimony that Dr Fong's Method was not developed by Dr Fong is materially contradicted by the second defendant's ownemail dated 20 March 2008 to the third defendant which stated that 'BrainBuilder Maths employs well-established strategies which were developed for over 25 years by (Dr Fong)'. When there is a conflict between contemporaneous documentary evidence and self-serving oral testimony, I will readily accept the former — please see Siti Norma Yaakob JCA's (as she then was) judgment in the Court of Appeal case of *Guan Teik Sdn Bhd v Haji Mohd Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 at p 439; [2000] 4 CLJ 324 at p 330;

(b) during cross-examination, the second defendant stated that he was 'a bit confused' about Dr Fong's Singapore Maths because he was used to BrainBuilder method. The court then cautioned the second defendant that he had taken an oath to tell the truth in court. After I have administered such a caution, the second defendant did a volte face and admitted that he understood 'Dr Fong's brand of mathematics';

(c) the second defendant gave evidence during cross-examination that he did not know whether the first defendant's staff had taught at TeamMathics Centres because he was not involved with TeamMathics Centres. Such evidence is not true because photographs in exhs P14–P93

('photographs') showed the second defendant's active involvement in TeamMathics Centre at Subang Jaya. The photographs are admissible as evidence as an exception to the documentary hearsay rule — *Tenaga Nasional Bhd v Api-Api Aquaculture Sdn Bhd* [2015] 3 AMR 811 at para 31. The decision in *Api-Api Aquaculture* has been affirmed by the Court of Appeal;

(d) during cross-examination, the second defendant disagreed with the plaintiff's learned counsel that the first defendant did not reply to the termination notice and letters dated 6 November 2015 and 25 November 2015 by the plaintiff's solicitors. However, the second defendant admitted subsequently that the first defendant's purported replies had not been adduced in this case. These answers by the second defendant undermine his own credibility; and

(e) the second defendant incredulously testified during cross-examination that he could not remember whether he had received an email dated 23 November 2014. An honest witness may not have remembered the contents of an email but would be candid to admit the witness's receipt of the email.

[31] I am not able to accept the third defendant as a truthful witness due to the following evidence and reasons:

(a) during cross-examination, the third defendant claimed that he had retired from business after the termination. The photographs however showed the third defendant's active participation in Subang Jaya's TeamMathics Centre;

(b) when questioned by the plaintiff's learned counsel on what had happened to the first defendant's students after the termination, the third defendant was less than honest by answering that he did not know what had happened to the first defendant's students. I will explain later in this judgment regarding what has happened to the first defendant's students after the termination;

(c) during cross-examination, the third defendant had the temerity to claim that 'My Maths Olympiad PLT' ('MMO'), a limited liability partnership, is a subsidiary of the first defendant. Such evidence clearly proves the third defendant's lack of credibility because a partnership cannot be a subsidiary of a company;

(d) Setia Pals Sdn Bhd ('SPSB') is incorporated on 13 December 2012 with the second and third defendants as its only directors. The first defendant holds 61% of the shares in SPSB. During cross-examination, the third defendant was economical with the truth by claiming that SPSB was one of the first defendant's branches. This is because there is no documentary evidence to prove that SPSB is one of the first defendant's branches. The

third defendant admitted during cross-examination that no evidence had been adduced in court regarding any payment by the first defendant to the plaintiff on the ground that SPSB was one of the first defendant's branches; and

(e) throughout the third defendant's cross-examination, he had been evasive until the court had to warn him that he had taken an oath to answer truthfully all questions posed by the plaintiff's learned counsel.

[32] I do not find the fourth defendant to be a credible witness due to the following evidence and reasons:

(a) despite the fact that the fourth defendant was a former employee of the first defendant, she testified during cross-examination that she was not aware of the MLA (2013). Such a testimony is materially contradicted by the her own witness statement which stated that she had resigned as the first defendant's employee after the termination;

(b) the fourth defendant stated during cross-examination that she was unaware of the fact that the first defendant had used the plaintiff's materials and logo. Such evidence could not be accepted because the fourth defendant attended a meeting on 26 June 2015 ('meeting (26 June 2015)') and a copy of the minutes of meeting (26 June 2015) had been given to her. According to the minutes of meeting (26 June 2015), Dr Fong, SP1 and SP2 had discussed with, among others, the fourth defendant, regarding the implementation of 'PowerMaths' workbooks;

(c) the fourth defendant gave evidence during cross-examination that she did not have access to the information regarding the first defendant's number of students and income. Such evidence could not be true in light of an attachment to the third defendant's email dated 8 July 2015 to SP1 (copied to, among others, the fourth defendant) which contained information regarding the first defendant's number of students, revenue and administration fees;

(d) during cross-examination, the fourth defendant initially testified that she did not know when TeamMathics Centres started. However, the fourth defendant readily agreed to the very next question by learned counsel for the plaintiff that TeamMathics Centres opened sometime towards the end of 2015; and

(e) the fourth defendant is a partner of the fifth and sixth defendants. Yet, the fourth defendant testified during cross-examination that she did not know whether the fifth and sixth defendants competed with BrainBuilder business. An honest partner of a business would know the nature of the partnership's business.

F. VALIDITY OF THREE DOCUMENTS

F(1). The court's approach

[33] When a party alleges a contract or transaction is unlawful, I will adopt the approach as stated in *Barisan Tenaga Perancang (M) Sdn Bhd v Dr Mansur bin Hussain & Ors* [2016] MLJU 1251; [2017] 2 MLRH 177 at para 39, as follows:

> 39. This court will adopt the following approach in deciding whether (two agreements) were a cloak for a transaction which is illegal and unenforceable under (MoneyLenders Act 1951):
>
> (a) illegality need not be pleaded — please see the Supreme Court's judgment delivered by Peh Swee Chin SCJ in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281 at p 288. ...;
>
> (b) a party may raise an issue on illegality at any stage of the proceedings, even at the appellate level. In *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd* [1989] 1 MLJ 457 at pp 460–462, the breach of s 5(1) (Housing Development (Control & Licensing) Act 1966) was only raised for the first time during the hearing of the appeal before the Privy Council. Despite the fact that the illegality issue had not been pleaded and raised in the High Court and the then Federal Court, the Privy Council in a judgment delivered by Lord Oliver, allowed such a question to be raised. ...;
>
> (c) proviso (a) to s 92 EA allows oral and documentary evidence to be admitted to contradict a contract on the ground of illegality — please refer to the Supreme Court's judgment delivered by Peh Swee Chin SCJ in *Lim Kar Bee* at p 289;
>
> (d) there is no privilege attached to a communication between a client and his or her practising (Advocate & Solicitor (A&S)) (Legal Communication) in the following circumstances:
>
> (i) when the Legal Communication was made in furtherance of any illegal purpose — please see proviso (a) to s 126(1) of the EA; and/or
>
> (ii) *when the A&S observed any fact in the course of the A&S's employment which showed any crime or fraud had been committed since the commencement of the A&S's employment — please see proviso (b) to s 126(1) EA;*
>
> (e) in deciding whether there is an illegality in a case, the court has the discretion to lift and/or pierce a corporate veil — please refer to *Lim Kar Bee* at p 291;
>
> (f) the court is not bound by the label or description of the agreement in question — please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141; [1996] 3 CLJ 26 at p 32;

(g) the court can and should go should behind the agreement or transaction to ascertain —

(i) the true nature of the agreement or transaction — Gopal Sri Ram JCA's judgment in the Court of Appeal case of *Sri Kelangkota — Rakan Engineering JV Sdn Bhd v Arab-Malaysian Prima Realty Sdn Bhd* [2001] 1 MLJ 324 at pp 333–334. The Court of Appeal's judgment in *Sri Kelangkota* has been affirmed by the Federal Court in a judgment given by Abdul Malek Ahmad FCJ (as he then was) — please refer to [2003] 3 MLJ 257; and

(ii) the true nature of the relationship between the parties — please see the judgment of Gopal Sri Ram JCA in the Court of Appeal in *Pan Global Equities Sdn Bhd & Anor v Taisho Co Sdn Bhd* [2006] 1 MLJ 158 at p 161; and

(iii) in *Lori (M) Bhd (Interim Receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997 at pp 1010 and 1015–1016, the Federal Court recognised the trend in other Common Law countries that courts should be slow to strike down commercial transactions on illegality. The Federal Court has incorporated such a trend as part of Malaysian Common Law in *Lori Malaysia Bhd*.

The Court of Appeal has affirmed the decision in *Barisan Tenaga Perancang*.

[34] If there is an illegal contract or transaction, the court is duty bound to take cognizance of the illegality and cannot enforce the illegal contract or transaction (even if the illegality is not pleaded or raised by any party) — please see *Tan Kang Hai v Slimming Sanctuary Sdn Bhd* [2016] MLJU 973; [2016] 5 MRLH 651 at paras 11 and 49–50.

[35] Learned counsel for the plaintiff and defendants have cited an impressive array of cases on illegal contracts. I am of the view that whether a contract or transaction has breached a provision of law, depends on the construction of that provision. As such, cases on illegality depend on the interpretation of the particular law which has been contravened.

F(2). Does the FA apply to the MLA (2013)?

[36] As decided in the above Part D(2), Malaysian law applies to the MLA (2013). The MLA (2013) is not entitled a 'franchise' contract. Nor does the MLA (2013) use the word 'franchise'. However, as explained in *Barisan Tenaga Perancang*, the court is not bound by the label or description given by the parties to the MLA (2013). I am of the view that the FA applies to the MLA (2013) for the following reasons:

(a) according to s 3(1) of the FA, FA applies to the operation of a 'franchise' in Malaysia. Section 4 of the FA defines a 'franchise' as follows:

A *'franchise' means a contract or an agreement*, either expressed or implied, whether oral or written, *between two or more persons by which —*

(a) the franchisor grants to the franchisee the right to operate a business according to the franchise system as determined by the franchisor during a term to be determined by the franchisor;

B *(b) the franchisor grants to the franchisee the right to use a mark, or a trade secret, or any confidential information or intellectual property, owned by the franchisor or relating to the franchisor, and includes a situation where the franchisor, who is the registered user of, or is licensed by another person to use, any intellectual property, grants such right that he possesses to permit the*

C *franchisee to use the intellectual property*;

(c) the franchisor possesses the right to administer continuous control during the franchise term over the franchisee's business operations in accordance with the franchise system; *and*

D (d) (Deleted by Franchise (Amendment) Act 2012 (Act A1442))

(e) *in return for the grant of rights, the franchisee may be required to pay a fee or other form of consideration*.

(f) (Deleted by Act A1442). (Emphasis added.)

E A perusal of the MLA (2013) clearly shows that the MLA (2013) fulfills all the four cumulative conditions of a 'franchise' in s 4(a), (b), (c) and (e) of the FA ('four prerequisites');

(b) the oral evidence of the second and third defendants regarding the operation of the first defendant's BrainBuilder business proves that such

F a business fulfills all the four prerequisites. Such evidence has not been rebutted by any of the plaintiff's witnesses;

(c) cll 11.2, 11.9, 23.1 and 23.2 of the MLA (2013) state that the first defendant shall comply with 'manuals' (defined widely in cl 1 of the

G MLA (2013)). The plaintiff has provided the first defendant with a 'franchise operations manual' ('FOM') to operate the BrainBuilder business. A perusal of the FOM clearly shows that the BrainBuilder business has satisfied the four prerequisites; and

(d) the plaintiff cannot deny that the MLA (2013) is a franchise agreement

H because the following evidence shows that Dr Fong and the plaintiff (Dr Fong is its alter ego) have actual knowledge of such a fact:

(i) Dr Fong's email dated 11 April 2013 to the second defendant referred to the first defendant as a master franchisee;

I (ii) Ms Anne Hooi Yoke Ling ('Ms Hooi') was the plaintiff's solicitor who drafted the three documents, including the MLA (2008). During cross-examination, Dr Fong admitted that he had been advised by Ms Hooi by way of an email dated 24 December 2013 to register the BrainBuilder business as a franchise ('Ms Hooi's

email dated 24 December 2013') but he did not act on that advice. Ms Hooi's email dated 24 December 2013 stated as follows:

> ... *The Government here is getting strict and if a business is run like a franchise long enough, they can treat it as a franchise and consider it an offence not to register*.
>
> *We will look into registration as the franchise and see how we go from here. The ultimate decision will be yours.* ... (Emphasis added.)

I attach great weight to Ms Hooi's email dated 24 December 2013 which was sent to Dr Fong only six days after the execution of the three documents on 18 December 2013;

(iii) Dr Fong explained during re-examination that the first defendant had been given the 'task' to register BrainBuilder business as a franchise; and

(iv) the plaintiff's learned counsel questioned the third defendant on 8 June 2017 ('the third defendant's cross-examination) as follows:

> Q: *Now Mr Leong, on the issue of franchise, do you agree that Dr Fong had requested that you look into that matter way back in December 2013?*
>
> ...
>
> A: I can't remember, My Lord.
>
> ...
>
> Q: *You were concerned that they will implement Bumiputera quota in the company*.
>
> ...
>
> A: I disagree, My Lord. (Emphasis added.)

F(3). Have ss 6(1) and/or 6A(1) of the FA been breached?

[37] The relevant parts of ss 6, 6A and 6B of the FA are reproduced below:

> s 6 Registration of franchisor
>
> (1) *A franchisor shall register his franchise with the Registrar before he can operate a franchise business* or make an offer to sell the franchise to any person.
>
> (2) *Any franchisor who fails to comply with this section, unless exempted by the Minister under section 58, commits an offence and shall, on conviction, be liable —*
>
> (a) *if such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit*;
>
> ...
>
> s 6A(1) Registration of franchisee of foreign franchisor

Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrars approval.

...

s 6B Registration of franchisee

A franchisee who has been granted a franchise from a local franchisor or local master franchisee shall register the franchise with the Registrar by using the prescribed registration form within fourteen days from the date of signing of the agreement between the franchisor and franchisee. (Emphasis added.)

[38] Dr Fong admitted during cross-examination that the first defendant's BrainBuilder business franchise was not registered with the Registrar of Franchise ('Registrar'). The Registrar is appointed under s 5(1) of the FA and performs the duties imposed and exercise the powers conferred on the Registrar under FA (please see s 5(2) of the FA).

[39] Regarding the validity of the MLA (2013) under the FA, I understand the submission of the plaintiff's learned counsel as follows:

(a) the court should be slow to strike down commercial contracts such as the MLA (2013);

(b) ss 6(1) and 6B(1) of the FA apply to a 'local' franchise while s 6A(1) of the FA concerns a 'foreign' franchise. Accordingly, ss 6(1) and 6B of the FA are not relevant to the MLA (2013) regarding a foreign franchise;

(c) s 6(2) of the FA provides for penal consequences if there is a breach of s 6(1) of the FA by a local franchisor. There is however no criminal sanction for a contravention of s 6A(1) of the FA by the franchisee of a foreign franchise. Accordingly, Parliament does not intend to invalidate the MLA (2013) for the first defendant's failure to register the BrainBuilder business franchise with the Registrar under s 6A(1) of the FA ('first defendant's failure'); and

(d) if the court invalidates the MLA (2013) based on a breach of s 6A(1) of the FA, this will cause an injustice to the plaintiff because:

(i) the plaintiff will be unable to enforce the MLA (2013) and guarantee against the first to third defendants and claim for losses suffered by the plaintiff as a result of various breaches of the MLA (2013) by the first to third defendants; and

(ii) it is solely the first defendant's failure which has contravened s 6A(1) of the FA.

[40] I am of the following view:

(1) ss 6, 6A and 6B of the FA have been introduced by Act A1442 with effect from 1 January 2013. Part I of the Interpretation Acts 1948 and 1967 ('the IA') applies to interpret the FA — please see s 2(1)(a) of the IA. Section 17A of the IA (in Part I of the IA) provides as follows:

> 17A Regard to be had to the purpose of Act
>
> *In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object*. (Emphasis added.)

In *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, the Federal Court applied s 17A of the IA to give a purposive construction of a tax statute.

In accordance with s 17A of the IA, this court gives a purposive interpretation of ss 6, 6A and 7 of the FA. The purpose of ss 6, 6A and 7 of the FA, as intended by Parliament through Act A1442, is for all franchises, local and foreign, to be registered with the Registrar ('purposive construction'). The purposive construction is supported by the following:

(i) the title to FA states that FA is 'to provide for the registration of ... franchises'. In the Federal Court case of *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 at p 283; [2004] 1 CLJ 701 at p 736, Augustine Paul JCA (as he then was) referred to the preamble to the Pengurusan Danaharta Nasional Berhad Act 1998 to ascertain the object of that statute; and

(ii) the speech by the then Deputy Minister for Domestic Trade, Cooperatives and Consumerism, Datuk Hjh Rohani bt Abdul Karim, in Dewan Negara on 17 July 2012 (at the second and third reading of the bill which was subsequently passed as Act A1442) ('Parliamentary debates') states the objects of Act A1442 as follows:

> ... *Akta Francais 1998 ... merupakan satu undang-undang bagi pendaftaran* dan pengawalseliaan *sistem perniagaan secara francais di Malaysia yang merangkumi perkara-perkara berikut:*
>
> ...
>
> (ii) *mengadakan satu sistem pendaftaran yang sistematik bagi membantu dan memantau perkembangan industri francais tanah air*;
>
> ...
>
> *Sebelum ini ..., kita hanya mendaftar francaisor dan tidak francaisi. Jadi didapati bahawa ini memang ... berat sebelah.*
>
> *Oleh yang demikian, ... kita mesti cepat-cepat membuatkan pindaan ini supaya*

kita mendapati satu perlindungan yang begitu baik kepada francaisi yang ... sudah sampai kepada angka 5,000 lebih francaisi ...

... itulah yang dimasukkan di dalam pindaan ini supaya ia memantapkan lagi, mengukuhkan lagi Akta Francais ini supaya kita dapat memberi satu keyakinan kepada usahawan-usahawan yang hendak menceburi dalam perniagaan francais didapati bahawa mereka akan menceburi dengan bidang ini dengan lebih yakin kerana ada undang-undang.

... kalau kita ada undang-undang sedemikian, bukan sahaja untuk dalam negara tetapi sebenarnya untuk yang datang daripada luar negara pun mempunyai satu keyakinan yang begitu tinggi untuk masuk ke negara kita ...

... daripada tahun 1998 iaitu semasa akta pertama digubal sehingga sekarang mendapati banyak ... loopholes yang mungkin akan melambatkan perkembangan industri francais.

Oleh yang demikian, sebab itulah kita memang memperketat dan memang didapati ... ada yang telah mengiklankan untuk menceburi dalam bidang francais. Sebenarnya mereka tidak ada berdaftar dengan kementerian kita iaitu bahagian francais tetapi telah mengiklankan supaya mengajak usahawan-usahawan menjadi francaisi. Jadi ini yang kita masukkan dalam seksyen-sekysen dan kita perkenalkan lagi penalti yang lebih tinggi supaya ini menjadi satu deterrent. Oleh yang demikian kita juga berharap dengan adanya pindaan ini kita telah dapat memperketat lagi jangan adanya penipuan-penipuan dan keadaan yang berat sebab itulah yang kita harapkan dengan pindaan kepada akta ini supaya mereka ini dapat kita beri perlindungan. (Emphasis added.)

The court may refer to Parliamentary debates regarding a statute in the interpretation of that statute — *Danaharta Urus* at pp 737–741. According to the Parliamentary debates, the requirement to register franchises on the part of franchisors and franchisees has the following objectives:

(1) to enable the Registrar to supervise the development of the franchise industry in this country;

(2) to protect franchisees from fraud;

(3) to encourage entrepreneurs to participate in the franchise industry; and

(4) to attract foreign investors to invest in our Malaysian franchise industry;

(2) as explained in the above Part F(2), the BrainBuilder business is a 'franchise' under s 4(a), (b), (c) and (e) of the FA. Based on the purposive construction, s 6(1) of the FA applies to all 'franchisors', local and foreign. The purposive construction is supported by the wide definition of 'franchisor' in s 4 of the FA to mean 'a person who grants a franchise to a franchisee and includes a master

franchisee with regard to his relationship with a subfranchisee, unless stated otherwise in (FA)'. Accordingly, I cannot accept the submission by the plaintiff's learned counsel that s 6(1) of the FA applies only to local franchisors. Such a submission is contrary to the purposive construction. Furthermore, if I have acceded to such a submission:

(i) this will create an absurdity wherein local franchisors have to register their franchises with the Registrar under s 6(1) of the FA but foreign franchisors are exempted from such a requirement. Under s 58 of the FA, only the 'Minister' (defined in s 4 of the FA as the Minister for the time being charged with the responsibility for matters relating to franchises) may exempt a franchisor, local and foreign, from the requirement of registration under s 6(1) of the FA; and

(ii) this will cause an injustice to franchisees of foreign franchises (as compared to franchisees of local franchises who are required to be registered under s 6(1) of the FA). This is because if a foreign franchisor is not required to register the foreign franchise with the Registrar under s 6(1) of the FA, the foreign franchisor may wriggle out from compliance with mandatory provisions legislated by Parliament in FA for the protection of franchisees of foreign franchises;

(3) additionally or alternatively, a literal interpretation of s 6(1) of the FA together with the wide definition of 'franchisor' in s 4 of the FA, requires a foreign franchisor to register the franchise with the Registrar ('literal interpretation');

(4) based on the purposive construction and literal interpretation, the plaintiff is required to register the BrainBuilder business franchise with the Registrar under s 6(1) of the FA. The plaintiff's failure to do so amounts to a contravention of s 6(1) of the FA ('the plaintiff's breach');

(5) it is not disputed by the first to third defendants that the first defendant's failure has breached s 6A(1) of the FA ('the first defendant's breach');

(6) the effect of the plaintiff's breach and the first defendant's breach ('two breaches') on the validity of the MLA (2013) depends on whether ss 6(1) and 6A(1) of the FA are intended by Parliament to be mandatory or directory provisions. I have no hesitation to decide that our legislature has intended for ss 6(1) and 6A(1) of the FA to be imperative provisions. Such a decision is supported by the following reasons:

(i) the following four High Court decisions have held that the franchise agreements in those cases are void and unenforceable due to the failure to register the franchises in question:

(1) Zabariah Mohd Yusof J's (as she then was) judgment in *SP Multitech Intelligent Homes Sdn Bhd v Home Sdn Bhd* [2010] MLJU 1845; [2010] 16 MLRH 537 at p 539;

(2) Tengku Maimun J's (as she then was) decision in *Munafsya Sdn Bhd v Proquaz Sdn Bhd* [2012] MLRHU 1 at para 72; and

(3) the judgments of Abu Bakar Jais JC (as he then was) in *Lim Seng Kiat & Anor v Jee Hing Lim & Anor* [2015] MLRHU 1 at paras 16, and *Tea Delights (M) Sdn Bhd v Yeap Win Nee* [2015] MLJU 673; [2015] MLRHU 1 at paras 9–16;

(ii) the use of the mandatory term 'shall' in ss 6(1) and 6A(1) of the FA clearly shows Parliament's intention for these provisions to have mandatory effect — please see Mohd Dzaiddin FCJ's (as he then was) judgment in the Federal Court case of *Public Prosecutor v Yap Min Woie* [1996] 1 MLJ 169 at pp 172–173; and

(iii) the Parliamentary debates are clear regarding our legislature's intention for ss 6(1) and 6A(1) of the FA to be mandatory provisions;

(7) cl 48.1 of the MLA (2013) ('cl 48.1') provides that where any provision of the MLA (2013) is judged by the court to be invalid, such a provision may be severed from the MLA (2013) without invalidating the other provisions of the MLA (2013).

The court has a discretion to invoke the doctrine of severance to 'save' the lawful part of a contract by severing its illegal provisions. In this case, I cannot apply the doctrine of severance or cl 48.1 to save any provision in the MLA (2013) because:

(i) as explained in the above sub-para (6), ss 6(1) and 6A(1) of the FA are intended by Parliament to be mandatory provisions. If I have applied the doctrine of severance or cl 48.1, this will unlawfully circumvent the imperative provisions of ss 6(1) and 6A(1) of the FA; and

(ii) the two breaches do not concern a particular term of the MLA (2013) which is illegal and may be severed from all other lawful provisions of the MLA (2013). The two breaches concern the lack of registration of the first defendant's BrainBuilder business and taints the entire the MLA (2013);

(8) in view of the two breaches, I find the MLA (2013) to be void in its entirety under either one or both of the following grounds:

(i) the MLA (2013) is forbidden by ss 6(1) and 6A(1) of the FA within the meaning of s 24(a) of the CA; and/or

(ii) the MLA (2013) is of such a nature that, if permitted, would defeat ss 6(1) and 6A(1) of the FA (please see s 24(b) of the CA).

In the Federal Court case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 5 MLRA 377, at paras 70–71, Jeffrey Tan FCJ has held that when a party has alleged that a contract is illegal, the court has a duty to consider the

validity of the contract based on s 24 of the CA; and

(9) the above decision to invalidate the entire MLA (2013) based on s 24(a) and/or (b) of the CA is not unjust because the Dr Fong and the plaintiff (Dr Fong is its alter ego) have been legally advised by the plaintiff's solicitor, Ms Hooi, to register the first defendant's BrainBuilder business franchise under FA (by way of Ms Hooi's email dated 24 December 2014). Dr Fong and the plaintiff however chose to ignore this legal advice on the misconceived idea that shares in the first defendant might have to be given to bumiputeras (please see the third defendant's cross-examination). Furthermore, even if there was the first defendant's failure (not to register the BrainBuilder business franchise under s 6A(1) of the FA), the plaintiff could have exercised the power granted by the first defendant to the plaintiff under the PA and apply to the Registrar (as the first defendant's lawful attorney) to register the same under s 6A(1) of the FA.

F(4). Whether guarantee and PA are invalid due to illegal MLA (2013)

[41] In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180 at para 22, Richard Malanjum CJ (Sabah and Sarawak) decided in the Federal Court as follows:

> [22] At the outset we would think that the leave question is academic and misconceived in relation to this appeal. Our reason is this. It simply ignored the first stage of the transaction, namely, *the purchase of the native land itself through the native nominee. It was obviously done in order to circumvent a clear statutory prohibition. As such the purchase was clearly illegal as correctly found by the courts below. It was not disputed that it was the fourth respondent who was the actual purchaser of the native land through the native nominee. Such fact was confirmed by the execution of successive power of attorney, an instrument prohibited by s 64(2) of the SLO. In the power of attorney dated 8 July 2002, the native nominee purportedly gave absolute powers to the fourth respondent to deal with the native land. Obviously the fourth respondent must have been very well aware of the statutory prohibition. As such the purchase the native land itself was illegal ab initio. Section 24(a) and (b) of the CA is clear. In our view no amount of gymnastic argument could remedy the default. Thus, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality. Hence, even the third party first legal charge security for the term loan given by the appellant was also tainted with illegality.* (Emphasis added.)

Based on *Malayan Banking*, if a contract is void under any paragraph in s 24 of the CA, any other contract, instrument or document which is related to the void contract may be tainted with illegality and may also be rendered void.

[42] I am of the view that the three documents form a single composite transaction. This decision is premised on the following evidence and reasons:

(a) the three documents concern the same BrainBuilder business;

(b) the three documents are prepared by the same solicitor, Ms Hooi;

(c) cl 15.3 of the MLA (2013) provides that 'all persons with ownership interest' in the MLA (2013) 'must' execute the guarantee in the form provided in appendix 3 to the MLA (2013) ('appendix 3'). The guarantee is exactly in the form of appendix 3;

(d) cll 1–4 of the guarantee concern only the obligations of the first defendant under the MLA (2013);

(e) cl 34 of the MLA (2013) states that to 'secure the performance' of the first defendant of the obligations under the MLA (2013), the first defendant irrevocably appoints, among others, the plaintiff as the first defendant's attorney. Hence, the execution of the PA. Clause 1 of the PA provides that the first defendant has irrevocably appointed, among others, the plaintiff as the first defendant's attorney; and

(f) the three documents were executed on the same day (18 December 2013) and their execution was witnessed by Ms Hooi.

As the three documents constitute a single composite transaction, the illegality of the MLA (2013) will consequently taint the guarantee and PA. Accordingly, the guarantee and PA will be similarly void in their entirety under s 24(a) and/or (b) of the CA — please see *Malayan Banking*.

F(5). Whether court may grant remedy when three documents are void

[43] Sections 66 and 71 of the CA provide as follows:

> 66 *Obligation of person who has received advantage under void agreement*, or contract that becomes void
>
> *When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.*
>
> 71 *Obligation of person enjoying benefit of non-gratuitous act*
>
> *Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.* (Emphasis added.)

[44] I will first consider s 71 of the CA. This court relies on the opinion of the Privy Council delivered by Lord Upjohn in an appeal from Malaysia, *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor* [1967] 2 MLJ 118. It was decided in *Siow Wong Fatt* at p 120 as follows:

> *It has been common ground before their Lordships that four conditions must be satisfied to establish a claim under section 71.*

The doing of the act or the delivery of the thing referred to in the section:

(1) *must be lawful;*

(2) *must be done for another person;*

(3) *must not be intended to be done gratuitously; and*

(4) *must be such that the other person enjoys the benefit of the act or the delivery.* (Emphasis added.)

[45] Based on *Siow Wong Fatt*, s 71 of the CA does not apply for the court to grant relief to any party in this case because the first defendant's performance of the MLA (2013) is not lawful (due to the two breaches). Furthermore, the plaintiff's breach under s 6(1) of the FA has penal consequences under s 6(2)(a) of the FA.

[46] Regarding s 66 of the CA, Ramly Ali FCJ decided as follows in the Federal Court in *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301; [2014] 4 MLRA 11 at paras 37–39:

37. *The effect of a void contract or agreement is provided for under under s 66 of the Contracts Act 1950 …*

38. … *The Privy Council in Harnath Kaur v Inder Singh* [1922] LR 50, 1 A 69 *in considering a claim based on s 65 of the Indian Contracts Act 1872 (which was identical to our s 66 of the Contracts Act 1950)*:

an agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

…

39. *A right to restitution may arise out of a failure of a contract though the right itself be not a matter of contractual obligation. It appears to be based on the principle exemplified in the Roman Law condictio causa data causa non secuta* (contract becomes impossible to perform owing to outbreak of war in 1914). *The Privy Council in Menaka v Lum Kum Chum* [1977] 1 MLJ 91, *in dealing with s 65 of the Indian Contracts Act 1872 … ruled*:

In that way effect will be given to s 65 under which each party is bound to restore any advantage which he has received to the person from whom he received it — see Govindram Seksaria v Radbone where Lord Morton of Henryton said:

> *The result of section 65 of the Indian Contract Act was that, as from (the date on which the contract became void) each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.* (Emphasis added.)

[47] According to *Tan Chee Hoe & Sons*, for s 66 of the CA to apply:

A (a) there must be evidence that a contracting party has received an 'advantage' in an agreement 'discovered to be void' or when the agreement 'becomes void'; and

(b) any contracting party who received an advantage can be ordered by the
B court to restore the advantage or pay compensation to the other contracting party.

[48] I am unable to invoke s 66 of the CA in this case because the first defendant has made payments under the MLA (2013) to Dr Fong and the
C plaintiff regarding the first defendant's right to operate BrainBuilder business. As such, the first defendant has not received any advantage under the MLA (2013) to be restored to the plaintiff under s 66 of the CA. Moreover, the plaintiff has taken the position in this case that the MLA (2013) is valid and has not breached FA. Hence, the plaintiff did not plead in the SOC and adduce any
D evidence regarding any advantage received by the first defendant under a void MLA (2013).

[49] The material facts in *Tan Chee Hoe & Sons* can be easily distinguished from this case because the purchaser in a sale of shares contract in *Tan Chee Hoe*
E *& Sons* has received a deposit of 10% of the sale price from the vendor (an advantage under the contract) and this deposit is rightfully ordered by the Court of Appeal (affirmed by the Federal Court) to be restored to the vendor under s 66 of the CA. In this case, no deposit has been paid by any party under
F the MLA (2013).

[50] It is to be noted that s 7(1) of New Zealand's Illegal Contracts Act 1970 ('the ICA (NZ)') confers power on the court to grant 'such relief by way of restitution, compensation, variation of the contract, validation of the contract
G in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just'. It is hoped that our legislature may confer power along the lines of s 7(1) of the ICA (NZ) on Malaysian courts to grant any just and appropriate remedy in cases regarding illegal contracts.

H **[51]** I have not overlooked the development of case law in the following countries regarding the court's power to grant relief in respect of illegal agreements:

(a) the judgment of United Kingdom's Supreme Court in *Patel v Mirza*
I [2017] 1 All ER 191. It is to be noted that Mary Lim Thiam Suan JCA in the Court of Appeal case of *Norihan bt Talib (sued in her personal capacity and trading under the name 'Tanjung Trading') & Ors v Mohd Nasir bin Hassan & Ors (suing on their own behalf and for 420 others as per list at 'Appendix A') and another appeal* [2018] 3 MLJ 670; [2017] MLRAU 1 at paras 34–37, has referred to the judgments of Lord Mance

and Lord Sumption in *Patel*;

(b) the High Court of Australia's decisions in *Nelson v Nelson* [1995] HCA 25; (1995) 132 ALR 133 and *Fitzgerald v FJ Leonhardt Pty Ltd* [1997] HCA 17; (1997) 143 ALR 569; and

(c) the majority judgment of the Supreme Court of Canada in *Hall v Hebert* [1993] 2 SCR 159.

[52] I am not able to apply the cases stated in the above para 51 because we have our own s 66 of the CA. Furthermore, as a matter of stare decisis, I am bound by the Federal Court's judgment in *Tan Chee Hoe & Sons*.

[53] I will now decide whether the plaintiff may rely on the doctrine of unjust enrichment as propounded by Azahar Mohamed FCJ in the Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441. According to *Dream Property*, at paras 110 and 117–118, the court may grant restitution to a plaintiff when the following four cumulative conditions of a cause of action in unjust enrichment have been proven by the plaintiff:

(a) the defendant had been enriched;

(b) the defendant's enrichment has been gained at the plaintiff's expense;

(c) the defendant's retention of the benefit is unjust; and

(d) the defendant has no defence to extinguish or reduce the defendant's liability to make restitution.

[54] Based on *Dream Property*, I find as a fact that the plaintiff has failed to prove a cause of action in unjust enrichment against the first to third defendants. This finding is based on the following evidence and reasons:

(a) the SOC did not plead that the first to third defendants have been unjustly enriched at the plaintiff's expense;

(b) the plaintiff's list of issues to be tried in this case did not state for the court's determination the question of whether the court should order the first to third defendants to make restitution to the plaintiff based on a cause of action in unjust enrichment;

(c) there is no evidence to prove that:

(i) the first to third defendants have been enriched in this case;

(ii) the enrichment of the first to third defendants has been gained at the expense of the plaintiff or Dr Fong; and

(iii) the retention of benefit by the first to third defendants is unjust; and

(d) evidence has been adduced in this case that the first defendant has paid Dr Fong and the plaintiff under the MLA (2013).

G. ASSUMPTION THAT THREE DOCUMENTS ARE VALID

[55] In the event that the Court of Appeal reverses the above decision that the three documents are void, I will now decide whether the first to third defendants have breached the MLA (2013) and guarantee.

G(1). Have the first to third defendants breached the MLA (2013)?

[56] As explained in the above Part D(3), the second and third defendants are the first defendant's alter ego. Accordingly, the second and third defendants are personally liable for any breach of the MLA (2013) by the first defendant.

[57] Firstly, I am satisfied that the first to third defendants have breached cl 17.1 of the MLA (2013) ('cl 17.1') as follows:

(a) according to cl 17.1, a monthly report must be furnished to the plaintiff which include all the details stated in paras (a)–(f) of cl 17.1;

(b) the first defendant only gave to the plaintiff either a one page or two page document entitled 'Revenue Summary' ('revenue summary'). The revenue summaries had no details and supporting documents; and

(c) the third defendant admitted during cross-examination that the revenue summaries did not have a breakdown of the number of students. The third defendant further admitted in cross-examination that despite the plaintiff's requests, the first defendant did not supply to the plaintiff details and breakdown of information in the revenue summaries.

[58] The second and third defendants alleged that the plaintiff could verify the contents of the revenue summaries with the first defendant's sublicensees ('sublicensees'). I am not able to accept this contention because the first defendant (not the sublicensees) owes a contractual duty under cl 17.1 to the plaintiff. Furthermore, there is no contract between the plaintiff and sublicensees.

[59] I should refer to the first defendant's letter dated 6 May 2015 to Dr Fong which stated, among others, as follows:

> ... you have agreed and accepted in total, the format and timing of the reporting (extraneous of [MLA (2013)]) by way of quarterly, as well as half yearly reporting ...
>
> There is thus no reason to believe that we are in breach of [MLA (2013)], as you have agreed by your conduct to alter Clause 17.1 and 17.2 [MLA (2013)] on the Monthly Reports and General Reports to be submitted to you.

I am not able to accept the contents of the first defendant's letter dated 6 May 2015 because cl 45 of the MLA (2013) provides that the MLA (2013), including cl 17.1, may only be varied by a written agreement between the plaintiff and first defendant. There has not been any written agreement between the plaintiff and first defendant to vary the MLA (2013), let alone cl 17.1.

[60] Clause 17.2 of the MLA (2013) ('cl 17.2') states that the first defendant must furnish to the plaintiff 'any other ... calculations or information' as required by the plaintiff. I find as a fact that the first to third defendants have contravened cl 17.2.

[61] The plaintiff has proven the following breaches of the MLA (2013) by the first to third defendants:

(a) the third defendant agreed during cross-examination that the first defendant did not pay the increase in administration fees to the plaintiff upon the renewal of sublicenses for BB Centres in Subang Jaya and Cheras Alam Damai — please see cl 6.2(a)(i) and para 8(iii) of Appendix 1 ('Appendix 1') to the MLA (2013);

(b) cl 29.2 of the MLA (2013) ('cl 29.2') provides that the first defendant will not without the plaintiff's prior written consent 'conduct, carry on, be involved with or acquire any interest (financial or beneficial) in any other business ... which is similar to or competes with' the BrainBuilder business. Clause 29.2 has been breached by the first to third defendants as follows:

(i) SP2 sent an email dated 26 August 2015 to the second and third defendants which requested the second and third defendants to explain regarding MMO. Subsequently, there was an email dated 14 September 2015 (from SP2) and a letter dated 14 September 2015 (from the plaintiff) to the second and third defendants regarding MMO. The third defendant admitted during cross-examination that he did not reply to the emails and letter concerning MMO. The registration of MMO as a business which is similar to and/or which may compete with the BrainBuilder business, constitutes a breach of cl 29.2; and

(ii) SPSB was incorporated on 13 December 2012 with the second and third defendants as its only directors. The first defendant holds 61% of the shares in SPSB. There is a contravention of cl 29.2 with the incorporation of SPSB which has a similar business and/or which may compete with the BrainBuilder business;

(c) the first defendant had operated more than five BB Centres but did not pay to the plaintiff sublicense fees for each of the centres in excess of five (as provided in cl 6.1 of the MLA (2013) read with para 5 of Appendix 1); and

(d) after the termination, the second and third defendants breached cl 29.3 of the MLA (2013) by carrying on TeamMathics business (which competes with the BrainBuilder Business). This is clear from the following evidence:

(i) the photographs;

(ii) publication dated 11 August 2016 in *Sin Chew Daily* (a national newspaper in Chinese), exh P12 ('newspaper publication'). The newspaper publication stated the same telephone number as first defendant's BB Centre in Subang Jaya;

(iii) during cross-examination, the fourth defendant admitted that:

(1) all TeamMathics Centres used the same premises and same telephone numbers as the first defendant's BB Centres; and

(2) except for three TeamMathics Centres, the other TeamMathics Centres are managed by the same personnel who previously managed the first defendant's BB Centres; and

(e) the first defendant did not give any notice or inform its students of the termination. It is clear that TeamMathics Centres have taken over the students who have initially enrolled in BB Centres.

[62] Regarding Setapak Centre, I find that Dr Fong and the plaintiff are estopped from claiming that the first to third defendants have breached the MLA (2013) because Dr Fong has admitted during cross-examination that he had received payments from the first defendant regarding Setapak Centre — please see the Federal Court's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at pp 343–344; [1995] 4 CLJ 283 at pp 294–295.

G(2). Whether the second and third defendants are liable under guarantee

[63] Regarding the breaches of the MLA (2013) by the first to third defendants (please see the above Part G(1)), the second and third defendants are clearly liable to the plaintiff under the guarantee.

H. HAVE THE SECOND TO SIXTH DEFENDANTS COMMITTED TORT OF CONSPIRACY TO DEFRAUD PLAINTIFF?

[64] In *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2016] 11 MLJ 38, I have followed, among others, the Court of Appeal decisions in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 at paras 30–34, and *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393 at paras 13–14, regarding the elements of the tort of conspiracy by unlawful means (which includes the tort of

conspiracy to defraud). It was held in *Muniandy* at para 21, as follows:

21. Based on my understanding of the above cases:

(a) the three elements of the tort of conspiracy to injure by unlawful means ('three elements'), are as follows:

(i) there must be proof of:

(1) an agreement; and/or

(2) a combination of efforts

of the conspirators to injure the plaintiff. Such an agreement or combination may be:

(A) formal or informal; or

(B) in writing or by word of mouth;

(ii) there are acts committed to execute the agreement or combination to injure the plaintiff; and

(iii) the plaintiff has suffered damage due to acts done in execution of the agreement or combination to injure the plaintiff.

[65] I am satisfied that the plaintiff has failed to discharge the legal and evidential burden to prove on a balance of probabilities that the second to sixth defendants have conspired to defraud the plaintiff. This decision is based on the following evidence and reasons:

(a) there is no evidence of any agreement or combination of efforts on the part of the second to sixth defendants to commit fraud on the plaintiff ('agreement/combination');

(b) no act has been committed to execute any agreement/combination. During cross-examination of SP1, he admitted that he had no evidence that the second and third defendants had conducted classes for the fifth and sixth defendants by using Dr Fong's Method; and

(c) the plaintiff has not adduced any evidence regarding any loss or damage which the plaintiff has suffered due to any act done in execution of any agreement/combination.

I. WHETHER THE SECOND TO SIXTH DEFENDANTS HAVE COMMITTED TORT OF BREACH OF CONFIDENCE

[66] According to the Federal Court's judgment delivered by Richard Malanjum CJ (Sabah and Sarawak) in *Dynacast (Melaka) Sdn Bhd & Ors v Vision Cast Sdn Bhd & Anor* [2016] 3 MLJ 417; [2016] 6 CLJ 176 at para 31, the tort of breach of confidence has the following three ingredients:

(a) the information in question must have the necessary quality of confidence;

(b) the information must have been imparted in circumstances importing an obligation of confidence; and

(c) there must be an unauthorised use of that information to the detriment of the party communicating it.

[67] I find as a fact that the plaintiff has failed to prove that the second to sixth defendants have committed tort of breach of confidence. This is because there is no evidence that there has been an unauthorised use of the plaintiff's confidential information by the second to sixth defendants to the plaintiff's detriment. During cross-examination, Dr Fong admitted that the plaintiff did not have evidence that the defendants had used the students' database of BrainBuilders business.

J. WHETHER DR FONG HAD MISREPRESENTED TO FIRST TO THIRD DEFENDANTS

[68] I am of the view that Dr Fong has not committed any fraudulent or negligent misrepresentation to the first to third defendants regarding the three documents. Nor did Dr Fong misrepresent anything to the first to third defendants which falls within any of the paras (a)–(c) of s 18 of the CA. Section 18 of the CA reads as follows:

'Misrepresentation' includes —

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[69] The above decision is supported by the fact that the first to third defendants did not raise any concern or complaint regarding any misrepresentation by Dr Fong ('alleged misrepresentation') until after the filing of the plaintiff's suit. The alleged misrepresentation is clearly an afterthought by the first to third defendants to stifle unlawfully the plaintiff's suit.

[70] Even if is assumed that the alleged misrepresentation has been proven, I cannot allow the counterclaim (the first to third defendants) in view of the illegality of the three documents (please see the above Parts F(3) and F(4)) and

the court's inability to grant any remedy in this case (please refer to the above Part F(5)).

K. WHETHER THE PLAINTIFF'S SUIT IS AN ABUSE OF COURT PROCESS

[71] The tort of abuse of court process has been explained by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425 at pp 434–436; [1998] 2 CLJ 340 at pp 352–356. The plaintiff's suit cannot constitute an abuse of court process because:

(a) the first to third defendants have breached the MLA (2013) (please refer to the above Part G(1)); and

(b) save for the illegality of the guarantee (as explained in the above Part F(4)), the second and third defendants would have been liable to the plaintiff under the guarantee (please see the above Part G(2)).

L. COSTS

[72] In view of the illegality and unenforceability of the three documents, there will be no order as to costs regarding the plaintiff's suit and counterclaim (the first to third defendants) — please see *Tan Kang Hai* at para 54.

M. THE COURT'S DECISION

[73] Premised on the above evidence and reasons:

(a) the plaintiff's suit is dismissed;

(b) the counterclaim (the first to third defendants) is dismissed;

(c) no order as to costs is made in this case; and

(d) the SFC order is discharged and the sum of RM50,000 (furnished as security for costs by the plaintiff to the defendants) shall be refunded to the plaintiff.

[74] In summary:

(a) despite cl 37:

(i) this court has jurisdiction to try this case pursuant to s 23(1)(a), (b) and/or (c) of the CJA. The Malaysian court is the appropriate forum, as compared to a court in Singapore, to hear this matter. In any event, all the parties in this case have irrevocably submitted to the jurisdiction of this court; and

A (ii) Malaysian law applies to the MLA (2013);

(b) the two conditions have been fulfilled for the court to lift the corporate veil to reveal that:

B (i) Dr Fong is the alter ego of DFB and the plaintiff; and

(ii) the second and third defendants are the first defendant's directing mind and will;

(c) the MLA (2013) constitutes a 'franchise' agreement because all the four prerequisites in s 4(a), (b), (c) and (e) of the FA have been fulfilled. Hence, the FA applies to the MLA (2013);

C

(d) in view of the two breaches under ss 6(1) and 6A(1) of the FA, the entire MLA (2013) is void under s 24(a) and/or (b) of the CA. The guarantee and PA are also void under s 24(a) and/or (b) of the CA because all the three documents form a single composite transaction;

D

(e) as the three documents are void, on the facts of this case the court cannot grant redress to any party under:

E (i) ss 66 or 71 of the CA; or

(ii) the doctrine of unjust enrichment;

(f) if the three documents are valid:

F (i) the first to third defendants are liable to the plaintiff for breaches of the MLA (2013); and

(ii) the second and third defendants are liable to the plaintiff under the guarantee;

(g) the second to sixth defendants have not committed:

G (i) the tort of conspiracy to defraud the plaintiff; and

(ii) the tort of breach of confidence;

(h) Dr Fong has not misrepresented anything to the first to third defendants regarding the three documents; and

H

(i) the plaintiff's suit does not constitute an abuse of court process.

[75] This judgment serves as a reminder that *all* franchisors and franchisees (local and foreign) are mandatorily required under ss 6(1), 6A(1) and 6B of the FA to register their franchises with the Registrar.

I

Plaintiff's claim and defendant's counterclaim dismissed.

Reported by Afiq Mohamad Noor